No.

375

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 375

JULIUS BERNARD SHERMAN,

Petitioner,

vs.

JOSEPH E. RAGEN, Warden, Illinois State Penitentiary, Joliet, Illinois,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR THE RESPONDENT.

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BRIEF FOR THE RESPONDENT.

RESPONDENT'S ACCEPTANCE OF PETITIONER'S STATEMENT OF THE CASE.

Petitioner's counsel has stated the case fully, fairly and accurately. We accept his Statement of the Case without correction or addition.

Opinion Below.

As petitioner's brief correctly states, the Illinois Supreme Court rendered no opinion other than the memorandum and rescript fully and correctly set forth in petitioner's brief. It is not reported.

The Questions Presented.

I.

DOES THE ILLINOIS SUPREME COURT'S OPINION REST UPON THE ADEQUATE GROUND OF STATE LAW THAT THE ILLINOIS POST CONVICTION REMEDIES ACT DOES NOT AFFORD A MEANS OF ASSERTING MATTERS OF FACT OR CLAIMS OF CONSTITUTIONAL RIGHT THAT WERE OR MIGHT HAVE BEEN PRESENTED IN THE PROCEEDINGS CULMINATING IN PETITIONER'S CONVICTION, IT NOT APPEARING THAT HE WAS PREVENTED FROM ASSERTING SUCH ALLEGED FACTS OR CLAIMS IN THAT ANTECEDENT PROCEEDING?

II.

IF PETITIONER'S ASSERTIONS OF ALLEGED FACT ARE COGNIZABLE AND HIS CLAIMS OF CONSTITUTIONAL RIGHTS ARE COGNIZABLE IN THIS PROCEEDING, DOES PETITIONER'S APPLICATION FOR POST CONVICTION RELIEF SUBSTANTIALLY DISCLOSE THAT HE IS IMPRISONED WITHOUT DUE PROCESS OF LAW?

SUMMARY OF ARGUMENT.

I.

The Illinois Supreme Court's judgment rests solely upon the ground that Illinois' Post Conviction Remedies Act does not afford an appropriate mode of asserting constitutional claims that were or might have been presented in the proceedings culminating in petitioner's conviction, there being no substantial suggestion that those claims were not and could not have been presented in those proceedings. This is a ground of State procedure, not of Federal constitutional law. Therefore this writ of *certiorari* should be dismissed. (See *Jennings* v. *Illinois*, No. 95 and *La Frana* v. *Illinois*, No. 96.)

II.

The scope of permissible inquiry upon Federal *habeas corpus* is not an obligatory measure of the scope of inquiry afforded by a purely statutory State proceeding. (See *Jennings* v. *Illinois*, No. 95 and *La Frana* v. *Illinois*, No. 96.)

III.

Even if the Federal scope of inquiry as to collateral attack on judgments of conviction were the measure of inquiry under this State statutory proceeding, petitioner would not be entitled to a retrial of issues which he litigated or could have litigated at the time of his original conviction. (See *Jennings* v. *Illinois*, No. 95 and *La Frana* v. *Illinois*, No. 96.)

IV.

If the merits of the case were before the Illinois Supreme Court, then its judgment must still be affirmed because it must be deemed to have weighed petitioner's affidavit as against the evidence and findings in the trial court record and therefore permissibly concluded that petitioner had not "demonstrated" a denial of due process of law. (See *Jennings* v. *Illinois*, No. 95 and *La Frana* v. *Illinois*, No. 96.)

V.

Even if petitioner's allegations and claims are cognizable in this proceeding, they do not substantially charge that petitioner's imprisonment denies him Federal due process.

ARGUMENT.

Respondent respectfully refers to Points I, II, III and IV of its Argument, in *Jennings* v. *Illinois*, No. 95, and *La Frana* v. *Illinois*, No. 96, October Term, 1951, and incorporates them in this brief by reference thereto.

V.

Even if petitioner's allegations and claims are cognizable in this proceeding, they do not substantially charge that petitioner's imprisonment denies him Federal due process.

Petitioner's application for post conviction relief relates a shocking narrative of police brutality. But it does not show or fairly compel the inference that such brutality culminated in or contributed to petitioner's sentence and sentence.

Although police brutality may violate a prisoner's constitutional rights, so as to give rise to Federal prosecution of the offending official (*Screws* v. *United States*, 325 U. S. 91), it does not vitiate a conviction unless the brutality contributed to the conviction, as where it coerced the accused into pleading guilty in open court or into signing a confession upon which such conviction rested *in whole or in part*. *Lisenba* v. *California*, 314 U. S. 219, is directly in point. This Court said, at page 235:

> "* * * Moreover, petitioner does not, and cannot, ask redress in this proceeding for any disregard of due process prior to his trial. The gravamen of his complaint is the unfairness of the use of his confessions, and what occurred in their procurement is relevant only as it bears on that issue."

In the *Lisenba case, supra,* the Court said at page 236:

> "On the other hand, the fact that the confessions have been conclusively adjudged by the decision below to be admissible under State law, notwithstanding the circumstances under which they were made, does not answer the question whether due process was lacking. The aim of the rule that a confession is admissible unless it was voluntarily made is to exclude false evidence. Tests are invoked to determine whether the inducement to speak was such that there is a fair risk the confession is false. These vary in the several States. This Court has formulated those which are to govern in trials in the Federal courts. The Fourteenth Amendment leaves California free to adopt, by statute or decision, and to enforce, such rule as she elects, whether it conform to that applied in the federal or in other state courts."

In this case, the trial was before the court without a jury. Hence there was no need, except a formal one, for the trial judge to hold a "preliminary hearing", conceptually and formally distinct from the trial before him although actually forming a part of it, to determine whether he would "receive" the confession. Such a hearing serves a real purpose when it is in the absence of a jury which is to hear the confession if it is admitted and not to hear it if it is excluded. It would serve no purpose for a judge to hold such a "preliminary hearing" in a case where he, and he alone, is the sole trier of the facts.

But in any event, the document styled a "confession" contained petitioner's legend, "I would rather not sign this confession, because it is not true." Petitioner's counsel argues that the document was nevertheless incriminatory in part. However this may be, it appears that the trial judge said in substance that he would "throw the case out of court" unless the State produced some evidence other than this "confession" which was not a confession at all.

The State did produce other witnesses, who testified directly to petitioner's guilt and whom the trial court believed.

So far as the alleged perjury of the witness Booker and Miss Mann is concerned, while petitioner says that their testimony was false and that they were paid to give it by the police officers, he does not allege that the police officers *knew* that the testimony was false. The payment may well have been, and it should be presumed that it was, the compensation customary to recompense witnesses, particularly those in straitened financial circumstances, for their time, transportation and loss of earnings in testifying.

In any event, the issue of the truth or falsity of this testimony was litigated at petitioner's trial. Due process does not require that it be relitigated.

Lisenba v. *California*, 314 U. S. 219, is again in point. In that case the reward given to the witness who implicated the defendant was far more substantial than money. It was life itself; for the witness was admittedly spared the death penalty in exchange for his testimony. This Court said, at page 227:

> "* * * There is no adequate showing that there was a corrupt bargain with Hope, and the practice of taking into consideration, in sentencing an accomplice, his aid to the State in turning state's evidence can be no denial of due process to a convicted confederate."

A fortiori, the unexplained payment of money to a witness does not so taint his testimony as to vitiate a conviction resting thereon. The Court will take judicial notice that the Department of Justice spends large amounts of money in transporting, feeding and housing important witnesses in Federal criminal prosecutions.

In short, the record discloses that the trial court heard evidence concerning petitioner's alleged "confessions", rejected it as a basis for petitioner's conviction, and heard witnesses whose motives and inducements for testifying were fully explored at the trial. The trial court believed the evidence against petitioner and convicted him.

Such a record does not demonstrate the lack of fundamental fairness inherent for reversal in this Court under the due process clause of the Fourteenth Amendment.

This does not make a case of due process denied.

Conclusion.

For reasons apparent on the record and urged in this brief, it is respectfully submitted that the Illinois Supreme Court's judgment rests upon adequate State grounds, wherefore the writ of error should be dismissed.

But if this case be before this Court on the merits, then it is submitted that the Illinois courts' judgments should be affirmed.

Respectfully submitted,

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